(10)

No. 96-542

IN THE

Supreme Court Of The United States

OCTOBER TERM, 1996

WALTER MCMILLIAN,

Petitioner,

v.

MONROE COUNTY, ALABAMA,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

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BRIEF FOR RESPONDENT

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BRIEF FOR RESPONDENT

In this action under 42 U.S.C. § 1983, petitioner seeks to hold respondent Monroe County liable for the allegedly unconstitutional actions of a sheriff. He claims that the sheriff is a final policymaker for the County even though, as the court below recognized, sheriffs are *state* officials under state law and counties neither control sheriffs nor are authorized to have *any* law enforcement policies. For the reasons that follow, the Court should reject this effort to transform section 1983 by making local governments vicariously liable for the actions of every autonomous but locally based official operating in their territories.

STATEMENT

Proceedings Below

In this action, petitioner Walter McMillian asserts federal and state claims against a variety of defendants alleged to have caused his false conviction for the 1986 murder of Ronda Morrison. Petitioner's 1988 conviction was overturned in 1993 by the Alabama Court of Criminal Appeals, based on a showing that substantial exculpatory and impeachment evidence had been withheld from petitioner and his counsel. *See McMillian v. State*, 616 So. 2d 933 (Ala. Crim. App. 1993). This civil action followed.

Petitioner's complaint alleges that his conviction was engineered by three people who were primarily responsible for investigating the murder: (1) Tom Tate, the Sheriff in Monroe County, (2) Larry Ikner, a state employee who works as an investigator with the District Attorney's office,[1] and (3) Simon Benson, another state employee who works as an investigator with the Alabama Bureau of Investigations.[2] They are alleged to have violated his constitutional rights by "causing his pretrial detention on death row, manufacturing inculpatory evidence, and suppressing exculpatory and impeachment evidence." Pet. App. 2a.

Petitioner brought claims under 42 U.S.C. § 1983 and state tort law against numerous defendants as individuals, including Sheriff Tate, Ikner and Benson. He added claims against Monroe County and against Tate and Ikner in their

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[1] Mr. Ikner works for the District Attorney for the 35th Judicial District, which covers Monroe and Conecuh Counties.

[2] In addition to the parties listed in the caption, these three individuals were parties to the same appeal in the court of appeals.

official capacity -- on the theory that the Sheriff is a county "policymaker" and that both Tate and Ikner acted pursuant to an "unwritten policy and custom, attributable to the defendant Monroe County." *Id.* at 51a-52a.

In 1994, the district court granted a motion to dismiss all of the claims against Monroe County and Tate and Ikner in their official capacity. In so doing, it "construe[d] the complaint as alleging federal and state claims against Defendants Tate and Ikner in their official capacities as officers of *Monroe County*, not as officers of the *State of Alabama*." *Id.* at 35a (emphasis in original). It therefore viewed the "claims directly against Monroe County based on alleged behavior by Defendants Tate and Ikner, as encapsulating the official capacity claims against Defendants Tate and Ikner," *id.* at 36a, and treated both sets of claims together.

In dismissing the § 1983 claims asserted directly or indirectly against the County, the district court relied on the Eleventh Circuit's ruling in *Swint v. Wadley*, 5 F.3d 1435 (11th Cir. 1993), which this Court later vacated on jurisdictional grounds in *Swint v. Chambers County Commission*, 115 S. Ct. 1203 (1995). Pet. App. 53a. In *Swint*, the court of appeals had ruled that a sheriff in Alabama could not be a final policymaker for a county in the area of law enforcement because, under Alabama law, counties have no law enforcement authority. That decision compelled dismissal of petitioner's claim that Sheriff Tate acted here as a policymaker for Monroe County. *Id.* at 54a. It also led the district court to rule that Tate and Ikner could not have acted "in accordance with an unlawful County policy," because, "[a]ccording to *Swint*, . . . an Alabama county can have no policy concerning law enforcement unless

it has the authority to make such policy." *Id.* at 55a.[3]

The district court certified this issue for immediate appeal pursuant to 28 U.S.C. § 1292(b) and the Eleventh Circuit granted permission to take an interlocutory appeal. *Id.* at 3a. Petitioner argued that the district court had erred in dismissing his claims against the County, relying on the theory that Sheriff Tate is a final policymaker for the County in the area of law enforcement. *Id.* at 2a.[4] The court of appeals affirmed.

Because the *Swint* case had been vacated, the Eleventh Circuit undertook a thorough review of the reasoning that underlay that prior ruling. It held, first, that before a given official can be a final county policymaker, he or she must have authority to set policy in an area where, under state law, the county has authority to set policy. "If the official's actions do not fall within an area of the local government's business, then the official's actions are not acts of the local government." *Id.* at 8a (citing cases from the Eleventh and other Circuits). Here, the court held, counties have no role in law enforcement.

It also rejected petitioner's argument that, under Alabama law, sheriffs do set law enforcement policy for a given county (rather than the State) because they are authorized to act only in that county. The court saw "no anomaly in having different state policymakers in different counties." *Id.* at 10a. It rejected the claim that the *Swint* rule is inconsistent with this

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[3] The court followed closely parallel reasoning in dismissing the *state*-law claims asserted against Monroe County and against Tate and Ikner in their official capacity. Pet. App. 72a-75a.

[4] On appeal, petitioner abandoned the claim that Monroe County could incur liability under section 1983 based on the actions of Larry Ikner, who was a state employee of a state official, the District Attorney.

Court's prior ruling in *Pembaur v. City of Cincinnati*, 475 U.S. 469 (1986). Pet. App. 10a-14a. Finally, the court distinguished the Eleventh Circuit's own prior ruling in *Parker v. Williams*, 862 F.2d 1471, 1477-81 (11th Cir. 1989), where, based on its understanding that Alabama law gives counties responsibility for jail maintenance, the court had held that counties can be held liable under section 1983 for hiring decisions made by sheriffs when acting as jailers. The court of appeals noted that, in the area of law enforcement, there is no comparable "partnership" between Alabama counties and sheriffs. Pet. App. 14a-19a.[5]

SUMMARY OF ARGUMENT

Petitioner's basic argument is both straightforward and superficial. Because, he asserts, the Sheriff *looks* more like a county official than a state official, Monroe County should be held liable under section 1983 for the Sheriff's law enforcement activities. In so arguing, petitioner ignores the actual distribution of authority over law enforcement under Alabama

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[5] More recently, in No. 96-6333, *Turquitt v. Jefferson County*, the Eleventh Circuit has decided to review *en banc* the validity of the *Parker* panel's holding that counties in Alabama can be held liable under section 1983 for the actions of sheriffs acting as jailers. The *en banc* argument was recently rescheduled for next fall. The district court in *Turquitt* had followed *Parker* but stated the view that *Parker* is wrong based on Alabama law. *See Turquitt v. Jefferson County*, 929 F. Supp. 1451 (N.D. Ala. 1996). Rejecting the notion that counties have any role in the operation of jails, the court stated:

> The office of a sheriff in Alabama is a state constitutional office. The duties of the sheriff are prescribed by state statute. What authority does a county have to circumvent the state law or to interpose its own authority, which it can then delegate to the sheriff, when that authority has already been delegated to the sheriff by the State? . . . A county cannot delegate authority it never has.

Id. at 1454. *See also* Pet. App. 23a-24a (Propst, J., concurring specially below).

law and thus the real issue that must be addressed in order to determine if the Sheriff is a "policymaker" for the County as required by *Monell v. Department of Social Servs.*, 436 U.S. 658 (1978), and its progeny. An examination of Alabama law reveals that the Sheriff does not speak for the County in the area of law enforcement, because his authority over law enforcement does not emanate from the County Commission and cannot be withdrawn by the County Commission. In fact, the County, as such, is not authorized to play any role in law enforcement at all.

1. It is clear that the question presented in this case should be answered based on state law. *See Jett v. Dallas Indep. School Dist.*, 491 U.S. 701, 737 (1989); *City of St. Louis v. Praprotnik*, 485 U.S. 112, 123 (1988); Pet. App. 6a. Here, the Alabama Constitution expressly designates sheriffs as *state* executive officials. Ala. Const. art. V, § 112. All oversight of their operations is exercised by other state officials -- the Governor, the Attorney General, judges and district attorneys. County commissions have no authority over sheriffs' law enforcement activities. Nor are they authorized under state law to have *any* policies of their own in the field of law enforcement. The Eleventh Circuit was thus plainly correct when it held that the Sheriff was not exercising "county power," or creating county "policies," when he engaged in law enforcement activities.

2. Petitioner argues that an autonomous official, wholly independent from the County's governing body, can make policy for the County. This argument is fundamentally inconsistent with the analysis of section 1983 set forth in *Monell*.

a. The reason the *Monell* Court decided to treat municipalities as "persons" under the statute was their status as separate corporations. The Court concluded that, at the time of section 1983's passage, it was understood that corporations are

"persons" for most purposes. 436 U.S. at 687-89. But if that is the legal basis for allowing municipal liability, it makes no sense to hold counties liable for acts of sheriffs over whom they have no control. A "corporation," after all, does not typically (if ever) include officers or employees who have the power to bind the corporate entity but are immune from control by its governing board. Petitioner's approach -- that counties should be held strictly liable for all violations of federal law committed by any official who happens to operate exclusively within their geographic bounds -- finds no support in *Monell*.

b. Indeed, *Monell* specifically limits municipal liability to cases where the municipality *caused* the violation pursuant to an official policy. 436 U.S. at 692. This limitation was based both on the language of section 1983, *id.* at 691-92, and on Congress's rejection in 1871 of the Sherman amendment -- a proposal that would have held municipalities vicariously liable for the violent actions of their private citizens, *id.* at 693-94. This causation requirement plainly is not satisfied in this case.

To begin with, as the *Monell* Court noted, the one thing that Congress clearly did not intend was imposition of liability for law enforcement actions or inactions *on municipal entities not authorized to engage in law enforcement*. That is precisely what petitioners seek to impose in this case. More generally, *Monell* held that the causation requirement precludes actions against municipalities based on a *respondeat superior* theory. Here, however, petitioner's claim would fail even under a *respondeat superior* theory, since he does not claim that the County has control over the Sheriff. Thus, petitioner is asking the Court to impose a form of vicarious liability even broader than that *rejected* in *Monell*.

3. Petitioner offers no other cogent reason for treating the Sheriff as a policymaker for the County.

a. Petitioner's argument that this case is controlled by *Pembaur v. City of Cincinnati*, 475 U.S. 469 (1986), is wholly unpersuasive. That case did not involve the question whether a sheriff is a county policymaker. While the Court noted, and did not take issue with, the *Sixth Circuit's* holding that a sheriff spoke for a county, it did not analyze the question itself. *Id.* at 484. In any event, *Pembaur* involved Ohio law, which is very different from Alabama law with respect to the role that counties play in law enforcement.

b. Petitioner's argument based on the fact that the County has insured itself against liability for the sheriff's conduct is circular and ultimately irrelevant. Under state law, the County is not liable for acts committed by the Sheriff in his official capacity. Until this Court resolves the issue presented here, however, a county still will face the *possibility* of a judgment based on a sheriff's action. The County's prudence in taking out an insurance policy to protect itself from such a judgment cannot be transformed into substantive evidence to support petitioner's case.

c. Petitioner has also failed to offer any common-sense explanation of why counties in Alabama should be liable for the actions of sheriffs. There is no danger that states will seek to insulate their municipalities from liability by transforming other municipal officials into state officials operating outside the control of municipal governing bodies. Nor would it be unfair to deny access to the County's "deep pocket." That is not a proper basis for expanding the scope of section 1983. In *most* section 1983 actions, the only available defendant is the individual official, sued in his individual capacity. That is what Congress intended in every case except those where municipalities directly cause violations of federal law. That did not occur here.

ARGUMENT

Petitioner's argument for attributing the conduct and policies of Sheriff Tate to Monroe County is based primarily on the fact that, on the surface, he "looks" like a county official. But superficial appearances alone cannot justify imposing on Monroe County liability for every unconstitutional policy that the Sheriff may choose to adopt. Alabama law provides that sheriffs, although they are elected and operate in specified counties, are state officials who report to other state officials for many of their functions and are not answerable *in any way* to county commissions. On such facts, this Court's seminal ruling in *Monell*, far from supporting municipal liability, precludes it.

In holding that Congress intended to include municipalities within the category of "persons" who may be sued under section 1983, the *Monell* Court relied on the fact that municipalities are corporations distinct from the rest of the state governmental structure. It went on to make clear that municipalities may be held liable only for their own illegal *policies* -- not on the basis of *respondeat superior*. Here, counties, as corporations governed by county commissions, have no law enforcement role in general and no role in overseeing sheriffs in particular. Thus, counties in Alabama cannot, under state law, have *any* policy -- unconstitutional or otherwise -- with regard to law enforcement. Treating the Sheriff as a final policymaker for the County in the area of law enforcement would ignore the "corporation" rationale that underlies municipal liability and expose counties to a form of vicarious liability even more extreme than *respondeat superior* -- liability for the misconduct of an official they cannot control.

I. UNDER CONTROLLING PRINCIPLES OF ALABAMA LAW, SHERIFFS ARE STATE OFFICIALS WHOSE ACTIONS CANNOT FORM THE BASIS OF COUNTY LIABILITY.

Section 1983 provides a remedy for violations of federal law committed, under color of state law, by "persons." That statute does not, however, guarantee that a public entity will be available as a potential defendant whenever a public official commits a violation of federal law. In most cases, including all cases involving misconduct by state officials and most cases involving misconduct by local officials, the only potential defendants are the officials themselves, sued in their individual capacity.

In *Monell*, this Court held that cities and counties are also "persons" within the meaning of section 1983, and thus may be held liable for *their* violations of the Constitution or federal law -- *i.e.*, for violations that occur pursuant to an official municipal policy or custom. Such a policy or custom, the Court added, may be created by the municipality's legislators or "by those whose edicts or acts may fairly be said to represent official policy." 436 U.S. at 694.

This Court has subsequently held that the determination whether a municipality may be held liable for the actions of a given official turns on *state* law. *See Jett*, 491 U.S. at 737; *Praprotnik*, 485 U.S. at 123; Pet. App. 6a.[6] "As with

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[6] *Jett* and *Praprotnick* shed little light on the question presented here because they dealt with government employees who were concededly employed by municipalities but were said to lack the authority required to set municipal policy. Petitioner attempts to find support for his position in *Pembaur*, a case involving an Ohio sheriff. As we show *infra*, however, the sole issue decided by the Court was whether a single act by an official found below to have municipal policymaking authority could constitute an actionable municipal policy. *See* pp. 32-35 *infra*.

other questions of state law relevant to the application of federal law, the identification of those officials whose decisions represent the official policy of the local governmental unit is itself a legal question to be resolved by the trial judge *before* the case is submitted to the jury." *Jett*, 491 U.S. at 737. Using relevant legal materials, it is up to the judge to identify those officials who "speak with final policymaking authority for the local governmental actor" whom the plaintiff seeks to hold liable. *Id.*

Here, state law gives an explicit and unambiguous answer: sheriffs are state officials who cannot, through their actions, create a basis for county liability either under state tort law or under section 1983. Although sheriffs are elected locally, work only in a given county, and receive their funding through the county's government, they do not set policy for the county in the area of law enforcement, because Alabama counties have no authority to become in any way involved in law enforcement.[7]

Alabama, like other states, has both a state government and county governments. Ala. Code § 11-1-1. Unlike in some states, however, Alabama counties do not have "home rule" powers; they are limited to performing the relatively narrow

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[7] Because of the clarity of state law, it is specious for petitioner to claim that he was improperly denied an opportunity to "develop 'custom and usage' facts to substantiate the allegation that the sheriff subjected him to county policies which violated his constitutional rights." Pet. Br. 26-27. Petitioner does not and cannot explain what facts he might "develop" that could be relevant. Certainly there is no suggestion in this case that the Sheriff's actions toward petitioner were caused by directives received from the county commission or some other representative of the County. He either acted autonomously or in concert with other *state* officials working on the case.

functions expressly delegated to them by state law. These functions primarily involve construction and maintenance of the county road system and two buildings -- a county courthouse and a county jail. *See id.* §§ 11-3-10, 11-3-11, 11-14-10. There is no statute authorizing counties to engage in law enforcement and they do not, in practice, play any role in passing or enforcing criminal laws.

Alabama counties are governed by county commissions elected by the voters. The commissions exercise limited legislative powers in the areas of responsibility assigned to counties, and individual commissioners also exercise executive powers in those same areas. This Court has recognized that the "principal function" of county commissions in Alabama "is to supervise and control the maintenance, repair, and construction of county roads." *Presley v. Etowah County Comm'n*, 112 S. Ct. 820, 824 (1992) (citing Ala. Code §§ 11-3-1, -10).

Rather than granting law enforcement authority to county government, Alabama reposes this power in the office of sheriff. A sheriff is elected in each county of the State by the voters of that county. Ala. Const. art. V, § 138. Under the Alabama Constitution of 1901, sheriffs are specifically designated as *state* officials who are part of the state executive branch. *Id.* § 112 ("The executive department shall consist of a governor, lieutenant governor, attorney general, state auditor, secretary of state, state treasurer, superintendent of education, commissioner of agriculture and industries, *and a sheriff for each county*.") (emphasis added).[8] As a result, they share the same "sovereign" immunity accorded under Alabama law to

[8] Although a sheriff is the only one listed in section 112, there are in fact numerous state officials elected at the local level in Alabama. These include circuit judges and district attorneys (elected to operate in one of the 40 judicial circuits) and state district judges (elected to operate in one of the 67 counties).

other state officials. *Ex Parte Purvis*, 1996 Ala. LEXIS 736 (Ala. Dec. 6, 1996); *Parker v. Amerson*, 519 So. 2d 442, 446 (Ala. 1987).[9] Moreover, it is well settled that, under state law, Alabama *counties* cannot be held liable for the tortious acts of sheriffs based on a theory of *respondeat superior* because sheriffs are not treated as county officials. *King v. Colbert County*, 620 So. 2d 623, 625 (Ala. 1993); *Parker v. Amerson*, 519 So. 2d at 442.[10]

Sheriffs in Alabama, to a significant extent, work for other *state* officials. They have three basic functions: (1) assisting the state judicial system by serving process and performing other related tasks, Ala. Code § 36-22-3(1), (2) operating the jail, *id.* § 14-6-1, and (3) enforcing state law in their county, *id.* § 36-22-3(4). With respect to judicial functions, sheriffs take orders from, and are supervised by, *state*

[9] The Alabama Supreme Court noted in *Parker* that state "appellate opinions sometimes have referred to sheriffs as county officers or as the chief executive officers of counties." 519 So.2d at 444 (citing cases); *see* Pet. Br. 22 (citing the same cases). The court stated, however:

> In none of these cases was Article V, § 112, Constitution of 1901, discussed. *The clear intention of the framers of the Constitution overrides these decisions*, none of which held that sheriffs were county officers for the purpose of imposing vicarious liability on a county for the acts of a sheriff.

519 So. 2d at 444 *(emphasis added)*.

[10] The Alabama courts have also rejected efforts to hold sheriff's *departments* liable for the state-law torts of sheriffs, reasoning that a sheriff's department is not a legal entity. *See King v. Colbert County*, 620 So. 2d at 626; *White v. Birchfield*, 582 So. 2d 1085 (Ala. 1991).

judges.[11] With respect to jail operations, they receive general supervision from the Alabama Board of Corrections. *See id.* §§ 14-6-84, -85, -86, -90, -98. In the area of law enforcement, sheriffs are not supervised on a day-to-day basis, but they can be directed to perform criminal investigations and make reports about those investigations by the Governor, the State Attorney General, or the district attorney. *Id.* § 36-22-5.[12] Moreover, the Governor is specifically authorized by the state constitution to require sheriffs to provide "information in writing, under oath," concerning the conduct of their duties. Ala. Const. art. V, § 121.[13] If a sheriff position becomes vacant, it is filled through an appointment by the Governor. Ala. Code § 36-9-17.

Indeed, the history of the office of sheriff in Alabama demonstrates the State's desire to centralize control over sheriffs in the *state* government. The 1901 Constitution specified that sheriffs may be removed from office for misconduct only through an original impeachment action in the Alabama Supreme Court, generally initiated by the State Attorney General at the request of the Governor. Ala. Const. art. VII, § 174. This was a change from the former system,

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[11] The primary trial court in the Alabama judicial system is the circuit court. There are forty judicial circuits, some of which are limited to one county while others encompass multiple counties. The presiding judge of each circuit exercises "general supervision" over the sheriff or sheriffs in the circuit. Ala. Code § 12-17-24. Other judges may also direct the activities of sheriffs with respect to particular matters. *Id.* § 36-22-3(2).

[12] District attorneys, as we have noted, are state officials elected to perform prosecutorial functions for a given judicial circuit. Ala. Code § 12-17-180.

[13] The minimum qualifications and training requirements for sheriffs are all specified in a state statute, with a state agency determining which training programs are adequate. Ala. Code § 36-21-46. County commissions, by contrast, have no role in establishing such qualifications.

under which sheriffs were impeached at the local level. Ala. Const. art. VII, § 3 (1875).[14] The change was made in order to tighten central control over sheriffs, in response to the perception that "the neglect of sheriffs" had led to an "excessive number of lynching cases in Alabama." *Parker v. Amerson*, 519 So. 2d at 443. At that time, "the failure of county courts to punish sheriffs for neglect of duty and sheriffs' acquiescence in mob violence and ruthless vigilantism . . . led [the Governor] to believe that sheriffs must be held accountable to a higher and more central authority, the Supreme Court, and that this accountability would operate to guarantee the political rights of prisoners." *Id.* at 443-44; *see also id.* at 444 ("Sheriffs were made more accountable to the supreme executive power of the state, the Governor."). The 1901 Constitution also specified that it was an impeachable offense for a sheriff to make a false report to the Governor or to allow a prisoner in the county jail to be removed and killed or injured. Ala. Const. art. V, §§ 121, 138.

Thus, while the Governor and other state officials may not be intimately involved with an individual sheriff's law enforcement activities, they do have ample authority to act when a sheriff's law enforcement power is being abused. Here, for example, if it were true that Sheriff Tate had adopted a policy of fabricating inculpatory evidence and suppressing exculpatory evidence, the remedy provided by state law would be action by the Governor followed, if necessary, by impeachment proceedings before the Supreme Court.

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[14] A very similar provision, authorizing removal by what were then known as "county courts" of various specified "county officers" and city officials, but *excluding* sheriffs, was retained in the 1901 Constitution. Ala. Const. art. VII, § 175.

As for county commissions, Alabama law gives them *no* role in passing the criminal laws enforced by sheriffs, developing policies governing local law enforcement, or supervising sheriffs in the performance of their law enforcement duties. *See* Pet. App. 7a-8a; *Lockridge v. Etowah County Comm'n*, 460 So. 2d 1361, 1363 (Ala. Civ. App. 1984) (county commission not authorized to regulate sheriff's personnel decisions regarding deputies). Nor can county commissions remove sheriffs from office or discipline them in any way.

Counties do appropriate the funds for sheriffs' operations. But this aspect of state law, properly understood, only serves to reinforce the conclusion that the county commissions lack any power in the area of law enforcement. Under Alabama law, the duty of the county to provide funds and facilities to be used by sheriffs is largely non-discretionary. *See* Ala. Code § 11-14-10 (duty to maintain a jail); *id.* § 36-22-16 (duty to pay a specified salary to sheriff); *id.* § 36-22-18 (duty to furnish sheriff with necessary quarters, supplies, and automobiles). If a county appropriates an unreasonably small amount of money for these purposes, a sheriff can sue the commission in state court for relief. *See Geneva County Comm'n v. Tice*, 578 So. 2d 1070 (Ala. 1991); *Etowah County Comm'n v. Hayes*, 569 So. 2d 397 (Ala. 1990).

In sum, the county government is a conduit for the transfer of locally raised funds to the sheriff.[15] But the "power

[15] *Amici* ACLU and the Lawyers' Committee argue that a "sheriff's hiring and personnel decisions are subject to review by the *County* Personnel Board." Br. at 9 (citing cases). They neglect to note a more recent case holding that neither a sheriff nor his deputies is covered by a county personnel system because a "sheriff is not a county employee; rather, he is a member of the executive branch of state government and thus a state employee by virtue of the Constitution of the State of Alabama." *Whitten v. Lowe*, 677 So. 2d 778, 779 (Ala. Civ. App. 1995).

of the purse," in this instance, does not provide the legislative body with leverage to control the officer spending the money.[16] The State's decision to mandate local funding of sheriffs thus cannot be construed as an indirect grant to counties of a role in the law enforcement activities of sheriffs. *See Soderbeck v. Burnett County*, 821 F.2d 446, 451-52 (7th Cir. 1987) (Wisconsin sheriff is not a county policymaker, although locally elected and funded through county).[17]

The Eleventh Circuit thus had a sound basis for concluding in this case, as it had in *Swint*, that under state law any law enforcement policy adopted by a sheriff could not be attributed to the county for purposes of liability under section 1983. Sheriffs in Alabama do have a substantial degree of policymaking authority in the area of law enforcement. But, as the court of appeals recognized, this authority did not come from the county commissions and could not be retracted by those commissions.

As Justice O'Connor observed in her plurality opinion in *Praprotnik*, the "States have extremely wide latitude in determining the form that local government takes," and this has predictably produced "a rich variety of ways in which the *power of government* is distributed among a host of different officials

[16] Although state law authorizes a county commission to audit the expenditure of funds it has appropriated, Ala. Code § 11-3-11(a)(4), there is no basis for concluding that this authority could properly be used to question a sheriff's substantive policies and spending priorities.

[17] If funding were enough, then a number of state officials in Alabama would be transformed into county officials. Counties routinely pay part of the salary of officials such as District Attorneys and District Judges. Ala. Code §§ 12-17-68, -220.

and official bodies." 485 U.S. at 124-25 (emphasis added).[18] Given this reality, "a federal court would not be justified in assuming that municipal policymaking authority lies somewhere other than where the applicable law purports to put it." *Id.* at 126. Nor should it second-guess state-law limitations on municipal policymaking, by holding a county liable for "policies" adopted by an autonomous state official with respect to matters that are wholly outside the authorized scope of county activity.

II. PETITIONER'S PRIMARY ARGUMENT FOR TREATING AN ALABAMA SHERIFF AS A COUNTY POLICYMAKER IS NOT ONLY UNPERSUASIVE BUT FUNDAMENTALLY INCONSISTENT WITH THIS COURT'S RULING IN *MONELL*.

Petitioner responds to the ruling below, not by disputing the Eleventh Circuit's analysis of state law, but by reframing the question. He suggests that the power of the Monroe County Commission in the area of law enforcement is

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[18] Petitioner is not correct in claiming that the circuits "have almost uniformly held that where a sheriff is funded by the county, is elected by the county and has jurisdiction only in the county, the sheriff is the final policymaker for the county." Pet. Br. 12 n. 3. *See Thompson v. Duke*, 882 F.2d 1180, 1187 (7th Cir. 1989), *cert. denied*, 495 U.S. 929 (1990) (county cannot be sued for misfeasance in jail run by sheriff who answers only to the electorate and not to the county board); *Baez v. Hennessy*, 853 F.2d 73, 77 (2d Cir. 1988), *cert. denied*, 488 U.S. 1014 (1989) ("Where, as here, controlling law places limits on the County's authority over the district attorney, the County cannot be said to be responsible for the conduct at issue."); *Soderbeck v. Burnett County*, 821 F.2d at 451-52 (where state law designates sheriff as a state official, and he is independent of county control in the area of law enforcement, sheriff is not a county policymaker for purposes of section 1983). The differing outcomes among the circuits reflect, more than anything else, the wide variety of governmental arrangements among the states.

irrelevant, because the Sheriff himself is properly viewed as an autonomous local official who sets law enforcement policy for "the County." He bases this conclusion on the fact that the Sheriff has some of the characteristics commonly associated with local officials -- *i.e.*, (1) local election, (2) a local area of operations, and (3) funding through the county budget process. In other words, petitioner's argument is that the Sheriff "looks like" a county official and therefore must be a county policymaker.[19]

Entirely missing from this argument is any suggestion about why it makes *sense* to interpret section 1983 as authorizing municipal liability for the acts of an official who is locally based but acts entirely outside the control of the municipal governing body.[20] This omission is particularly striking in light of the reasoning that led this Court, in *Monell*,

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[19] Petitioner goes so far as to quote general treatises on law enforcement, and to analyze the etymology of the word "sheriff," Pet. Br. 20-21 -- as if either of these sources could establish what governmental structure currently exists in Alabama. For what it may be worth, his linguistic analysis is incomplete. "Sheriff" is a combination of the Old English words for "shire" and "reeve." Webster's Third New Int'l Dictionary 2094 (1986). A "reeve," in turn, was a "local administrative agent of the king in Anglo-Saxon times." *Id.* at 1907. Thus, a "sheriff" in Britain usually administered a county or shire "by royal appointment," *id.* at 2094, and was not a "local" official in the usual sense.

[20] The rule sought by petitioner certainly cannot be justified on the basis of the usual policies underlying tort law. If an autonomous Alabama sheriff commits a violation of the Constitution, the County cannot be said to merit punishment for this misdeed. Nor, obviously, would extending liability to the municipal body in such a case serve the cause of deterrence. *Cf. Monell*, 436 U.S. at 693-94 (rejecting argument that *respondeat superior* rule should apply under section 1983 because "accidents might . . . be reduced if employers had to bear the cost of accidents"). Finally, this Court has expressly rejected the argument that section 1983 should be applied to municipalities expansively so that "the cost of accidents [can] be spread to the community as a whole." *Id.*

to recognize municipal liability under section 1983. That reasoning *precludes* application of a test like the one implicitly proposed by petitioner -- a test that ignores the actual allocation of power under state law and turns on whether a given actor has the superficial appearance of a local official.

A. Petitioner's Argument Cannot Be Squared with the Primary Factor that Led this Court to Recognize Municipal Liability in Monell -- the Status of Municipalities as Separate "Corporations" Under State Law.

The first aspect of *Monell* that is relevant here is the basis on which this Court decided to treat municipalities as "persons" within the meaning of section 1983 -- the fact that they are organized as "corporations" under state law.[21] The conception of municipalities as corporations properly responsible as separate entities for their own corporate acts is strongly in tension with the proposition that Congress intended to hold municipalities liable for the acts of locally based officials acting entirely outside the control (and areas of responsibility) of the municipal governing board.

The *Monell* Court determined, based on the Dictionary

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[21] Much of the *Monell* decision was devoted to explaining why the Court was wrong in *Monroe v. Pape*, 365 U.S. 167 (1961), when it held that the legislative history of the Civil Rights Act of 1871 (more specifically Congress's rejection of the "Sherman amendment") precluded an interpretation of the statute as covering municipalities. The only affirmative support for municipal liability identified by the *Monell* Court in the legislative history came in (1) various statements anticipating a broad interpretation of the statute, and (2) statements by Representative Bingham anticipating that takings claims would be actionable under the statute. 436 U.S. at 683-87.

Act and various court decisions, that by 1871 corporations (including "municipal corporations") were generally treated as "persons" for purposes of statutory analysis. 436 U.S. at 687-89. In the Dictionary Act, passed just months before the Civil Rights Act of 1871, Congress had provided that "'in all acts hereafter passed . . . the word 'person' may extend and be applied to bodies politic and corporate . . . unless the context shows that such words were intended to be used in a more limited sense.'" *Id.* at 688 (quoting Act of Feb. 25, 1871, § 2, 16 Stat. 431). The Court thus concluded that "the 'plain meaning' of [section 1983] is that local government bodies were to be included within the ambit of the persons who could be sued." *Id.* at 689.[22]

This view of municipalities as separate public corporations is a consistent theme throughout the *Monell* opinion and throughout the legislative record analyzed in that opinion.[23] It was what led the Court to equate municipalities with the other "persons" who could be sued under section

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[22] Shortly thereafter, Congress amended the Dictionary Act to delete the reference to "bodies politic" while continuing to define "person" as including "corporations." It did so on the theory that the term "bodies politic" either was redundant or, if broader than the term "corporation" because it included governmental structures not formally incorporated, went too far. *See Ngiraingas v. Sanchez*, 495 U.S. 182, 190-91 (1990). This clarification further rebuts the notion that Congress conceived of the municipalities liable under section 1983 as nebulous collections of locally based officers, rather than as corporate structures ultimately governed by county boards.

[23] *See, e.g.*, 436 U.S. at 668 (opponents of Sherman amendment thought Congress could not "obligate ***municipal corporations*** to keep the peace if those corporations were neither so obligated nor so authorized by their state charters") (emphasis added); *id.* at 669 (constitutional objections to Sherman amendment "would not have prohibited congressional creation of a civil remedy against state ***municipal corporations*** that infringed federal rights") (emphasis added).

1983 -- *i.e.*, individual public officials in their individual capacities. *See, e.g.*, 436 U.S. at 685-86 ("[S]ince municipalities through their official acts could, equally with natural persons, create the harms intended to be remedied by [section 1983] . . . there is no reason to suppose that municipal corporations would have been excluded from the sweep of [section 1983].").[24]

Eleven years later, the Court drew the same line when it came time to decide whether the states themselves are "persons" within the meaning of section 1983. In *Will v. Michigan Dep't of State Police*, 491 U.S. 58 (1989), the Court again discussed the definition of "person" in the Dictionary Act -- a definition that included "bodies politic and corporate" -- concluding that this phrase "was used to mean *corporations, both private and public (municipal)*, and not to include the States," *id.* at 69 (emphasis added). The Court in *Will* thus left *Monell* undisturbed, while holding that Congress did not intend to authorize suits against "States or governmental entities that are considered 'arms of the State' for Eleventh Amendment purposes." *Id.* at 70.

In recognizing this distinction, the Court was not drawing on a clean slate. The "perception of local political subdivisions as mere chartered corporations remained largely unchanged during the nineteenth century." Melvyn R. Durschlag, *Should Political Subdivisions Be Accorded Eleventh*

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[24] *See also* 436 U.S. at 682 (1871 Congress saw "no distinction of constitutional magnitude between officers and agents -- including corporate agents -- of the State"); *id.* 707-08 (Powell, J., concurring) ("Thus, it has been clear that a public official may be held liable in damages when his actions are found to violate a constitutional right . . . . Today the Court recognizes that this principle also applies to a local government when implementation of its official policies or established customs inflicts the constitutional injury.").

Amendment Immunity?, 43 DePaul L. Rev. 577, 590 (1994). Moreover, the common law has long differentiated between municipal corporations and other governmental entities created by the state by allowing only the former to be sued for the torts of their agents. *See, e.g.*, 2 J. Dillon, *Municipal Corporations* § 966 (4th ed. 1890) ("As respects *municipal corporations proper*, whether specially chartered or voluntarily organiz[ed] . . ., it is, we think, universally considered . . . that *they are liable for acts of misfeasance* . . . done by their authorized agents or officers . . . .") (emphasis in original).[25]

But accepting petitioner's argument -- that Monroe County is liable for policies created by the incumbent in an office that it did not create and cannot control -- would require the Court to abandon this conception of municipalities as corporations. A "corporation" has a single governing board that controls its operations and either sets its "policies" or delegates that function to the officers. It is almost incoherent to suggest that a single corporation can include both a governing board and a separate official vested with unchecked authority to set corporate policy. That reality is reflected in the way that the *Monell* Court referred interchangeably to suits against "municipalities," 436 U.S. at 690, suits against "[l]ocal governing bodies," *id.*, and suits against a local "government as an entity," *id.* at 694.

Indeed, the precise issue raised here by petitioner -- whether a county as a municipal corporation can encompass both a governing board and an autonomous sheriff -- was

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[25] Indeed, the traditional rule was that incorporated cities could be sued but counties could not, precisely because the latter were not formally chartered as corporations and thus were viewed as "political divisions of the State created for convenience." 2 Dillon, *supra*, § 963; *see* 18 McQuillan, *Municipal Corporations* § 53.05 (3d ed. 1993).

anticipated by one of the congressmen whose statements in the 1871 debates were partially quoted in *Monell* (*see id.* at 680), Representative Burchard. As he put the matter:

> *Police powers are not conferred upon counties as corporations.* . . . The county commissioners . . . have [the] power to levy taxes, but they do not have any control of the police affairs of the county and the administration of justice. *These powers, I grant, are conferred in part by State laws upon some elective officers, such as the sheriff of a county.* . . . But still in few, if any, States is there a statute conferring this power upon the counties.

Cong. Globe 795 (April 19, 1871) (emphasis added). Representative Burchard then went on to express his opposition to the "Sherman amendment" -- a proposal that would have held counties liable for failure to enforce the law within their borders -- asserting that it was an "attempt to impose obligations upon a county for the protection of life and person which are not imposed by the laws of the State, and that it is beyond the power of the General Government to require their performance." *Id.* Thus, at least to him, it was clear that the existence of a sheriff in a county did not mean that the county as a corporation had any role in, or responsibility for, law enforcement -- or that it was constitutional to pretend otherwise by imposing liability on counties when sheriffs failed to keep the peace.

In essence, what petitioner asks the Court to adopt is a radically different conception of "Monroe County" as a unit of *geography*, where "county" policy can be set both by the county commission (including those officials to whom the commission delegates authority) *and* by any other officials authorized by

state law to operate in that geographic area.[26] But *Monell* did not authorize suits against units of geography; nor did it authorize suits against local governments for deprivations of federal rights committed by *state* officials operating within local borders. The only basis for treating municipalities as "persons" under section 1983 was the *Monell* Court's understanding of cities and counties as corporate entities with a separate, coherent and cohesive structure and a single governing body. It would make no sense to abandon that understanding and thereby expand municipal liability beyond anything that Congress could have had in mind. *See* 436 U.S. at 694 ("[I]t is when execution of a *government's* policy or custom . . . inflicts the injury that the *government* as an entity is responsible under § 1983.") (emphasis added).

Petitioner and his *amici* make much of the statement in *Monell* that a local government's policy may be set either "'by its lawmakers *or by those whose edicts or acts may fairly be said to represent official policy*.'" 436 U.S. at 694 (emphasis added); *see* Pet. Br. 8, 14; U.S. Br. at 13 n. 4; Br. of the ACLU and Lawyers Committee at 15, 19-20. But this language hardly suggests that the Court anticipated municipal policies created by acts of officials who are entirely outside the control of the municipal "lawmakers." This language in *Monell* refers to the familiar situation where an executive official, exercising powers *delegated* by municipal lawmakers and thus subject to their

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[26] It is commonplace for state officials, such as sheriffs, prosecutors and judges, to have functions that "concern the whole state or its people generally, although territorially restricted." 2 McQuillan, *supra*, § 4.115, at 245-46. Traditional local government law treats these as officers distinct from municipal officers, whose "powers and duties relate exclusively to matters of purely local concern." *Id. See also Calvert v. Cullman County*, 669 So. 2d 119, 121 (Ala. 1995) (difference between "county" and "county commission" as potential defendants is merely one of "nomenclature" with no legal consequence).

ultimate control, sets policy in a given area. In that situation, the policy is properly attributed to the municipality. But *Monell* points just the other way in cases where executive officials derive their power directly from the state and are immune from municipal control.[27]

To escape this logic, the United States attempts to introduce the concept of "separation of powers" into the discussion. U.S. Br. at 13 n.4. But that concept has little utility here. Unlike the federal government (and to a great extent states as well), municipalities do not possess all of the attributes of sovereignty; they are creatures of the states with only those powers specifically conferred on them. Thus, the fact that a county commission may lack law enforcement power does not, as the United States seem to presume, indicate that the "county's" law enforcement power is being exercised elsewhere, by another "branch" of the municipal government. Often, as in Alabama, it means the county has no role in that arena.

For these reasons, a federal court should require the clearest indications in state law before concluding that an entirely autonomous executive official is a part of and a policymaker for such a corporation. The Eleventh Circuit was therefore correct in holding that sheriffs in Alabama are *not* part of the county government.

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[27] Here, for example, petitioner alleged that Monroe County has a "policy and custom . . . of withholding exculpatory evidence in criminal cases, of pressuring and threatening witnesses to give false testimony, of threatening and punishing potential witnesses to prevent them from giving truthful exculpatory testimony, and of instigating unwarranted and malicious criminal prosecutions." Pet. App. 51a-52a (quoting First Amended Compl. ¶ 53). It would be rather remarkable if state law gave a sheriff the unilateral authority to adopt such policies for a county while denying the county commission any power to alter those policies.

B. Petitioner's Argument is Also Inconsistent With the Causation Requirement Recognized in Monell.

The tension between petitioner's position and *Monell* is even clearer in light of the Court's second holding -- that "Congress did not intend municipalities to be held liable unless action pursuant to official municipal *policy* of some nature *caused* a constitutional tort." 436 U.S. at 691 (emphasis added). *See also id.* at 694 (allowing municipal liability since the case "unquestionably involve[d] official policy as the *moving force* of the constitutional violation") (emphasis added). In every legal and practical sense, it is absurd to suggest that Monroe County as a municipal corporation (or the Monroe County Commission as its governing body) adopted or ratified a law enforcement policy that caused the alleged violations of petitioner's constitutional rights.

1. *Origins of the Causation Requirement*

The causation requirement in *Monell* was derived, in part, from the language of section 1983, which creates a right of action against "any person who . . . shall subject or cause to be subjected" any other person to a deprivation of federal rights. As the Court recognized, this "language plainly imposes liability on a government that, under color of some official policy, 'causes' an employee to violate another's constitutional rights," but it also "suggests that Congress did not intend § 1983 liability to attach where such causation was absent." 436 U.S. at 692. *See also Pembaur*, 475 U.S. at 478 ("*Monell* is a case about responsibility.")

Even more important to the Court's conclusion was "the legislative history, which disclosed that, while Congress never questioned its power to impose civil liability on municipalities for their *own* illegal acts, Congress did doubt its

constitutional power to impose such liability in order to oblige municipalities to control the conduct of *others*." *Id.* at 479 (emphasis in original). This insight was derived from rejection in the House of Representatives of the "Sherman amendment," a proposed addition to the same act that contained section 1983, which, as noted above, would have imposed liability on municipalities whenever private citizens within their borders "'riotously and tumultuously assembled . . . with intent to deprive'" another person of a federal right. *See Monell*, 436 U.S. at 666 (quoting the first conference version of the amendment). *See also Jett*, 491 U.S. at 726-27.

As the *Monell* Court exhaustively demonstrated, this proposal was defeated on the ground that many of "the local units of government upon which the amendment fastened liability were not obligated to keep the peace at state law and further that the Federal Government could not constitutionally require local governments to create police forces," either directly or through imposition of liability for damages. 436 U.S. at 673. Numerous members of the House asserted in the debates that "[c]ounties and towns are subdivisions of the State government, and exercise in a limited sphere and extent the powers of the State delegated to them; they are created by the State for the purpose of carrying out the laws and policy of the State, and are subject only to such duties and liabilities as State laws impose upon them." Cong. Globe 794 (April 19, 1871) (Rep. Poland). *See also id.* at 791 (Rep. Willard) ("The city and the county have no power except the power that is given them by the State."); p. 24 *supra* (quoting Rep. Burchard). The majority thus objected that "if we have the right to lay this obligation upon them, to require them to meet these damages, it must draw after it the power to go in there and say, 'You shall have a police, you shall have certain rules by which you may fulfill your obligation'" to keep the peace. Cong. Globe at 795 (Rep. Blair).

In sum, the legislative history reveals "ample support for [Representative] Blair's view that the Sherman amendment, by putting municipalities to the Hobson's choice of keeping the peace or paying civil damages, attempted to impose obligations on municipalities by indirection that could not be imposed directly." 436 U.S. at 679. But, having reviewed this history, the Court in *Monell* concluded that Congress in 1871 did not create the same "Hobson's choice," because, instead of "imposing an obligation to keep the peace" that did not exist in state law, section 1983 applied only where "a municipality . . . was obligated by state law to keep the peace, but . . . had not in violation of the Fourteenth Amendment." *Id.*

2. *Application of the Requirement Here*

The *Monell* causation requirement is implicated here in two ways. First, of course, there is a glaring conflict between petitioner's position and the *Monell* Court's specific holding that section 1983 cannot be read to impose liability on municipalities for failure to enforce the law if state law does not grant them law enforcement powers. As the Eleventh Circuit held, the Monroe County Commission has no power to enact policies affecting law enforcement or to review those adopted by the sheriff. Yet petitioner now says that the County should face potential liability under section 1983 based entirely on the law enforcement actions of Sheriff Tate.

Indeed, under petitioner's theory, the Commission's only means of avoiding potential liability would be to violate state law and exceed its assigned authority by attempting to control the sheriff. But that is precisely the outcome that Congress sought to avoid when it rejected the Sherman amendment on the ground that it would force municipalities to perform law-enforcement functions not delegated to them by state law. Thus, here again, petitioner asks the Court to adopt a statutory interpretation that would undercut one of the central

understandings expressed in *Monell* itself.

At a more general level, this Court held in *Monell* that a municipality may not be held liable "*solely* because it employs a tortfeasor -- or, in other words, . . . on a *respondeat superior* theory." *Monell*, 436 U.S. at 691 (emphasis in original). It concluded that Congress, having rejected one limited form of vicarious liability based on constitutional concerns in the Sherman amendment, can hardly have intended to authorize a broader form that "would have raised all the constitutional problems associated with the obligation to keep the peace." *Id.* at 693. *See also Jett*, 491 U.S. at 728-29. The Court specifically rejected the idea that a municipality's "right to control the actions of a tortfeasor" is a sufficient reason for imposing *respondeat superior* liability. Petitioner's argument, however, would have the perverse effect of allowing a form of vicarious liability under section 1983 that is even more extreme than the *respondeat superior* theory rejected in *Monell*.

Respondeat superior is a doctrine that holds a "master" liable for the torts of a "servant" acting within the scope of his assigned duties. A "servant" is traditionally understood to be "a person employed to perform services in the affairs of another, whose physical conduct in the performance of the service *is controlled, or is subject to a right of control*, by the other." *Prosser & Keeton on Torts* § 70, at 501 (5th ed. 1984) (emphasis added). This principle has been consistently applied in the context of municipal liability law. Thus, one leading treatise states that, "in order to hold a municipality liable in damages because of the tort of one alleged to be its servant, it must appear, and the plaintiff must prove, that the latter was the servant of the municipality at the time of the alleged tort." McQuillan, *supra*, § 53.66, at 445. Moreover, "[t]he *right to control* the action of the person doing the alleged wrong, at the time of and with reference to the matter out of which the

alleged wrong arose . . . governs in determining whether a municipality is liable under the rule of respondeat superior. The right to *discharge* or *terminate the relationship* is also important." *Id.* (emphasis added). *See also id.* at 446 ("[A] county and its commissioners are not liable for the actions of the sheriff or the sheriff's deputies under the doctrine of respondeat superior because they have no control over the acts of those officers.") (citing *Delk v. Board of Comm'rs of Delaware County*, 503 N.E.2d 436 (Ind. App. 2 Dist. 1987)); Dillon, *supra*, § 974, at 1193 (municipality may be liable for acts of officials if it "appoints or elects them, can control them . . ., can continue or remove them, [and] can hold them responsible for the manner in which they discharge their trust"; it is not liable for the acts of those who are "independent of the corporation as to the tenure of their office and the manner of discharging their duties" and thus are properly regarded as "public or State officers"); *Parker v. Amerson*, 519 So. 2d at 442 (Alabama sheriffs are not county employees "for purposes of imposing liability . . . under theory of respondant superior"); *Hereford v. Jefferson County*, 586 So. 2d 209, 210 (Ala. 1991) (same).

Yet petitioner, purporting to apply an "official policy" standard that was supposed to be more restrictive than *respondeat superior*, advocates a rule of vicarious liability that goes beyond *respondeat superior* -- indeed, beyond anything heretofore known to tort law. After all, he seeks to hold Monroe County strictly liable for the acts of an official over whom it has *no* control. And he does so in reliance on factors -- such as the Sheriff's election by local voters and funding through the County budget -- that have been specifically rejected as *insufficient* to justify municipal liability under a *respondeat superior* standard. *See Barnes v. District of Columbia*, 91 U.S. 540, 545-46 (1876) ("Nor can it in principle be of the slightest consequence by what means these several officers are placed in their position -- whether they are elected by the people of the

municipality or appointed by the President or a Governor."); *id.* at 546 ("It is equally unimportant from what source he receives compensation, or whether he serves without it."); McQuillan, *supra*, § 53.67.

Especially in view of this Court's admonition that, in interpreting section 1983, courts should "look first to the common law of torts," *Heck v. Humphrey*, 114 S. Ct. 2364, 2370-71 (1994), there is no reason to read the statute in this extreme way. Congress can hardly have intended in 1871 to authorize a form of municipal liability going far beyond *respondeat superior* and requiring cities and counties to exercise power in areas where they are barred from acting by state law.[28]

III. NONE OF PETITIONER'S OTHER ARGUMENTS PROVIDES A CONVINCING REASON FOR TREATING AN ALABAMA SHERIFF AS A COUNTY POLICYMAKER.

Beyond his reliance on the fact that Sheriff Tate "looks" like a county official, petitioner makes a few additional points. None provides a convincing basis for ignoring the clear dictates of state law requiring treatment of the Sheriff as a *state* official.

A. Nothing in *Pembaur* Supports Petitioner's Position.

Petitioner and his *amici*, while ignoring *Monell*, argue that this case is controlled by the Court's later decision in *Pembaur v. City of Cincinnati*. That case, however, did not deal with the same issue and does not support petitioner's

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[28] Thus, the proper reading of *Monell* is that satisfaction of the *respondeat superior* standard is a necessary but not sufficient basis for municipal liability based on acts of executive officials.

position in this case.

In *Pembaur*, the sole "question presented [was] whether, and in what circumstances, a decision by municipal policymakers *on a single occasion* may satisfy" the *Monell* official-policy requirement. 475 U.S. at 471 (emphasis added).[29] The Sixth Circuit had held that a county sheriff and a county prosecutor were county officials authorized to establish county policy, but had also held that approval of an illegal search on one occasion did not establish a "policy." *See id.* at 476. In the course of ruling that a single decision could constitute an actionable municipal "policy," this Court noted the Sixth Circuit's holding "based upon its examination of Ohio law, that both the County Sheriff and the County Prosecutor could establish county policy under appropriate circumstances." *Id.* at 484. The Court went on to say that this was a "conclusion that we do not question here," *id.*, adding in a footnote that "[w]e generally accord great deference to the interpretation and application of state law by the courts of appeals," *id.* at 484 n. 13 (citations omitted).

As this summary indicates, it is inexplicable how petitioner could repeatedly assert that the question presented here was addressed and resolved in his favor in *Pembaur*.[30]

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[29] *See also* Brief of Petitioner in No. 84-1160, *Pembaur v. City of Cincinnati* (presenting, as a sole question presented, the following: "Can a single, discrete decision of an elected county prosecutor which directly causes an unconstitutional search of a private medical office fairly be said to represent official policy so as to render a county liable under 42 U.S.C. § 1983?"); Brief of Respondents in *id.* (failing to contest the Sixth Circuit's holding that the sheriff is a county policymaker).

[30] *See* Pet. Br. at 6 ("In *Pembaur* . . . it has been *held* that when a sheriff is elected, funded and equipped by the county, with jurisdiction limited to the county, the sheriff is the county's final policymaker in the area of law enforcement.") (emphasis added); *id.* at 9 ("In *Pembaur*, a majority of this

There was no dispute in this Court about whether or not the sheriff in *Pembaur* had the kind of links with the county that made it possible for him to be viewed as a county policymaker. Moreover, when the Court touched on that question in passing, it declined to analyze it -- choosing instead to defer to a ruling of the Sixth Circuit on an issue of state law that had not been addressed in the parties' briefs.

In any event, even if *Pembaur* could be fairly read as having approved the Sixth Circuit's holding that a sheriff was a county policymaker, the case would have little relevance here. Any such holding in *Pembaur*, of course, would have been based on Ohio law, which, unlike Alabama law, plainly treats sheriffs as county officials.[31] That treatment reflects the fact that in Ohio, unlike in Alabama, county governments play a major role in law enforcement. County boards themselves play a significant role.[32] Moreover, each county has a *county*

Court *held* that a county sheriff in Ohio acted as a final policymaker for the county in the area of law enforcement.") (emphasis added); *id.* (because the Court affirmed the Sixth Circuit, "the Court *held* that the county was liable for the unconstitutional conduct of the sheriff in the performance of law enforcement functions").

[31] *See, e.g., State ex rel. Trago v. Evans*, 141 N.E.2d 665, 669 (Ohio 1957) (office of sheriff "is a county office created by legislative enactment"); Op. Ohio Att'y Gen. No. 90-091, at 9 (1990) ("[A] sheriff . . . and his deputies . . . are the chief law enforcement officers of a county.").

[32] As in Alabama, Ohio counties fund sheriffs and there is a sheriff in each county. Unlike Alabama, however, Ohio permits home rule, and its counties are recognized as having law enforcement power. *Compare* Op. Ohio Att'y Gen. No. 90-091, at 9 (counties may join with towns to coordinate regional law enforcement efforts), *with* Pet. App. 7a-8a (Alabama counties have no law enforcement role). Moreover, Ohio's chartered counties have significant control over their sheriffs. They control the manner in which sheriffs are chosen and may change the position of sheriff from an elective office to an

prosecutor who both works closely with the sheriff and serves as a legal advisor to all other county officials. *See Pembaur*, 475 U.S. at 484-85.[33] Thus, in Ohio, it would be impossible for anyone to conclude that counties are not authorized to have law enforcement policies.

In Alabama, by contrast, the district attorney is a state official whose operations may extend beyond a single county. Indeed, Sheriff Tate's close working relationship with the district attorney's office (and the Alabama Bureau of Investigations) on the very activities at issue in this case, *see* p. 2 *supra*, are among the most persuasive factors arguing against the proposition that he was simultaneously setting the law enforcement policy of Monroe County.

This Court has repeatedly made clear that identification of county policymakers turns on analysis of each state's law. *Jett*, 491 U.S. at 737; *Praprotnik*, 485 U.S. at 123. Here, the issue is one of Alabama law, and there is every reason for the Court to adhere to its stated practice of "accord[ing] great deference to the interpretation and application of state law" by the Eleventh Circuit in *this* case.

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appointive one. *See* Ohio Rev. Code Ann. § 302.01 (permitting chartered counties to choose an alternative form of government); Op. Ohio Att'y Gen. No. 85-039 (1985) (allowing the appointment of officers who are elected under general state law). In some instances, Ohio county boards select a replacement when the sheriff's office is vacant. *See* Ohio Rev. Code Ann. § 305.02.

[33] Indeed, as *Pembaur* was briefed in this Court, the sole claim of the petitioner was that the action of this county prosecutor in authorizing deputy sheriffs to engage in an unconstitutional forced entry constituted county policy. No action of the sheriff himself was even discussed. *See* Brief of Petitioner in No. 84-1160, *Pembaur v. Cincinnati*, at 11-13.

B. The Existence of a Potential Source for Payment of a Judgment, Other than the State Treasury, Does not Change the Outcome.

Petitioner points out that Monroe County has arranged insurance through the Association of County Commissions of Alabama Liability Self-Insurance Fund that might cover a judgment entered in this case against Sheriff Tate in his official capacity. He argues that the availability of this non-state funding source indicates that the Sheriff is not a state but a county official for purposes of the Eleventh Amendment -- and thus that the County may also be sued directly based on his actions. *See* Pet. Br. 18, 27 n. 13.

This argument is entirely circular and should be ignored. As the Eleventh Circuit recognized, Pet. App. 2a n. 2, if a court determined that the Sheriff was a county official, then the County would be liable for any judgment against the sheriff in his official capacity. But in insuring against this possibility, surely Monroe County cannot transform the Sheriff into a county official and thereby assume more responsibility for the Sheriff's action than it already bore. Given the prevailing legal uncertainty about the status of Alabama sheriffs, the County had every reason to protect itself against a possible judgment under section 1983 based on the Sheriff's action. But just as a private defendant's insurance is of no relevance to the merits of a tort suit, that the County has sought to protect itself from an adverse outcome in this case is similarly of no relevance. Moreover, it would be grossly unfair to conclude that, because some plaintiffs have chosen to assert claims against sheriffs in their official capacity on the theory that sheriffs are county officials, and because counties have chosen to obtain protection from such claims, counties have somehow waived their defenses or changed the allocation of governmental power in the state of

Alabama. Monroe County's liability must turn on an independent determination about whether the Sheriff is a county or a state official. The County's insurance bears not at all on this question.

C. Petitioner Has Offered No Other Persuasive Reason Why the Court Should Hold Municipalities Liable for the Actions of Officials Whom They Do Not Select or Control.

Petitioner and his *amici* also attempt to argue that it would be problematic, as a policy matter, to treat sheriffs in Alabama as something other than "walking county policymakers." These arguments are totally unpersuasive.

First, they argue that such an approach leaves states the power to insulate municipalities from all liability, simply by relabelling municipal officials as state officials. *See* Pet. Br. at 25-26; U.S. Br. at 14-15. But that makes no sense. The only way in which a state could limit municipal liability for the actions of senior municipal officials would be to change the law so that they are no longer controlled by the municipal legislative body. Merely designating a mayor or a city police chief as a "state official," without more, would change nothing in the typical municipal arrangement -- because any power exercised by these officials would still be subject to revocation or modification by the city council. And states are hardly likely to go on a binge of restructuring local government so that local lawmakers no longer have control over local executive officials.[34]

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[34] It is noteworthy, in this regard, that the Supreme Court's decision in *Lincoln County v. Luning*, 133 U.S. 529 (1890), which held that municipal corporations are not protected by the Eleventh Amendment, has had no apparent effect on the proliferation of municipal corporations and local

More fundamentally, petitioner and his *amici* seem to say that it would be unjust for him not to be able to sue a municipal defendant in this case. But that is probably the strangest of all of the arguments presented here. After all, it is the *norm* in section 1983 litigation for plaintiffs to be limited to suing individual defendants. That is what the statute, with its reference to "persons," was intended to accomplish. This Court has subsequently recognized that municipalities may be "persons" when they *cause* violations of federal rights. But it has also refused, in *Monell* and *Will*, to ignore the statutory language and hold that state and local governments should be held vicariously liable for violations of federal law committed by their officials and employees.

In sum, there is no reason to warp the principles of municipal liability in this case to give petitioner one more defendant to sue. Congress intended to allow municipalities to be sued under section 1983 in a specific set of circumstances -- when they adopt policies that lead to deprivations of federal rights. It is entirely spurious to suggest that, in this case, Monroe County did any such thing.

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government entities. *See* Melvyn R. Durchslag, *supra*. at 615. There is thus no reason to believe that a decision for respondent in this case would lead to a massive restructuring of local government.

CONCLUSION

The judgment of the United States Court of Appeals for the Eleventh Circuit should be affirmed.

Respectfully submitted,

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